Supreme Court, U.S.
FILED
MAR 14 2001
OFFICE OF THE CLERK

No. 00-967

In the Supreme Court of the United States

STEVEN D.C. BIGELOW, PETITIONER

v.

DEPARTMENT OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a military supervisor's review of his direct subordinate's personnel security file violated the Privacy Act of 1974, 5 U.S.C. 552a.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 217 F.3d 875. The order and judgment of the district court (Pet. App. 24a-25a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15a-16a) was entered on July 14, 2000. A petition for rehearing was denied on October 13, 2000 (Pet. App. 18a-19a). The petition for a writ of certiorari was filed on December 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. When he served as a major in the United States Air Force, petitioner worked in the Information Warfare and Special Technical Operations Center (Opera-

tions Center), which is a part of the Office of the Joint Chiefs of Staff at the Pentagon. Pet. App. 2a. United States Army Colonel Nathan Noyes was the head of the Operations Center and petitioner's immediate supervisor. *Ibid.*

In 1995, Noyes learned of allegations of misconduct by petitioner. Pet. App. 2a, 89a. Of greatest concern was the allegation that petitioner "sometimes disappeared in foreign countries near sensitive international borders." *Id.* at 2a, 90a. Other allegations included misrepresentations about petitioner's whereabouts while on leave in conjunction with official travel, failure to account for periods of paid leave, and use of a government computer for improper purposes. *Id.* at 90a.

Petitioner's assignment at the Pentagon required him to hold a security clearance that allowed access to materials at one of the highest levels of security classification. (The name of the classification, which is above "Top Secret," is itself classified.) Pet. App. 2a, 89a. The allegations against petitioner caused Noyes, as petitioner's supervisor, to question petitioner's trustworthiness and suitability for his extremely sensitive position. *Ibid.* Noyes requested access to petitioner's personnel security file. *Id.* at 2a, 90a. After reviewing the file with a security specialist, Noyes believed that petitioner had misrepresented facts about his past. *Ibid.* Noyes accordingly referred the matter to the Air Force for disciplinary action. *Ibid.*

Petitioner was relieved of his duties at the Pentagon and reassigned. Pet. App. 2a, 90a. Petitioner later received a promotion to the rank of lieutenant colonel and retired from the Air Force at that rank. Pet. 3.

2. Petitioner sued the Department of Defense (DoD) under the Privacy Act of 1974, 5 U.S.C. 552a, seeking damages and other relief on the ground that his

personnel security file was unlawfully disclosed to Noyes. Pet. App. 2a. The government moved to dismiss or for summary judgment on the ground that Noyes's review was authorized by 5 U.S.C. 552a(b)(1), which permits a federal agency to disclose personal records, without the consent of the subject of the records, to officers or employees of the agency "who have a need for the record in the performance of their duties." Following a hearing (see Pet. App. 26a-39a), the district court granted summary judgment for the government and denied as moot petitioner's motion for discovery. *Id.* at 2a, 24a-25a.

3. The court of appeals affirmed. Pet. App. 1a-14a. The court concluded that "[t]he appeal comes down to the question whether Colonel Noyes, as an officer of the agency maintaining [petitioner's security] file, had 'a need for the [petitioner's] record in the performance of [his] duties.'" *Id.* at 2a-3a. The court of appeals concluded, based on its review of the governing regulations, that Noyes's duties did include examining petitioner's security file because petitioner was under Noyes's supervision. *Id.* at 3a.

Under 32 C.F.R. 154.67(b), DoD personnel security investigative reports may be disclosed to "those designated DoD officials who require access in connection with * * * activities specifically identified under the provisions of [32 C.F.R.] 154.65." Among the activities identified in Section 154.65 are "determining eligibility of DoD military and civilian personnel * * * for access to classified information, [and] assignment or retention in sensitive duties or other specifically designated duties requiring such investigation." 32 C.F.R. 154.65. Finally, Section 154.60(a) of the DoD regulations provides that the trustworthiness of a person holding a security clearance and the individual's suitability for

assignment to sensitive duties are subject to ongoing review. "[T]he individual's trustworthiness is a matter of continuing assessment," and "[t]he responsibility for such assessment must be shared by the organizational commander or manager, the individual's supervisor and * * * the individual himself." 32 C.F.R. 154.60(a). The court of appeals concluded that those regulations support the government's position that Noyes, as petitioner's supervisor, had a need for access to petitioner's records to perform his duties, and that access accordingly was lawful under 5 U.S.C. 552a(b)(1). Pet. App. 3a.

The court of appeals rejected petitioner's contrary reading of the DoD regulations. The fact that reviewing subordinates' security files is not expressly enumerated as a duty of supervisors, the court held, does not alter the fact that reviewing such files may be necessary for the supervisor to fulfill his ongoing duty under Section 154.60(a) to assess trustworthiness. Pet. App. 4a; see 32 C.F.R. 154.60(c) (listing certain duties of supervisors). Likewise, the court concluded that neither the obligation that supervisors have to report "derogatory information" that is in their possession, 32 C.F.R. 154.55(b), nor the vesting of security-related personnel responsibilities (such as taking personnel actions that suspend access to classified materials) in commanders and heads of organizations, see 32 C.F.R. 154.55(c), relieves supervisors of their duty under Section 154.60(a) to assess trustworthiness. See Pet. App. 5a.

Finally, the court of appeals stated that even if it had been "somewhat less sure of [its] reading of the Defense Department's regulations," the court nevertheless would have affirmed dismissal of petitioner's suit based on the government's articulation of a similar interpretation of the regulations during the litigation,

given that there was no indication that DoD had ever adopted a different interpretation. Pet. App. 5a-6a (citing, *inter alia*, *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997)).

Judge Tatel dissented. Pet. App. 7a-14a. In his view, a supervisor's duty to assess the trustworthiness of subordinates does not give the supervisor an official need to examine a subordinate's personnel security file. *Id.* at 9a-10a. Judge Tatel read the DoD regulations as providing that a supervisor's role is limited to reporting adverse information about a subordinate to the Defense Investigative Service for further investigation. *Id.* at 10a; see 32 C.F.R. 154.60(c)(3).

Judge Tatel also disagreed that the government's interpretation of the DoD regulations was entitled to deference. Pet. App. 10a-14a; see also *id.* at 22a-23a (Tatel, J., dissenting from denial of rehearing en banc). He found no affirmative indication that the government's position before the court of appeals "reflect[ed] the agency's fair and considered judgment" concerning proper interpretation of the regulations, *id.* at 10a (quoting *Auer*, 519 U.S. at 462), and deemed it significant that DoD lawyers did not appear on the government's principal appellate brief. *Id.* at 13a-14a; see *id.* at 22a-23a.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or another court of appeals. Further review therefore is not warranted.

1. The Privacy Act of 1974 allows an agency to disclose records about an individual, without the individual's consent, "to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties." 5 U.S.C.

552a(b)(1). The courts of appeals uniformly recognize that Section 552a(b)(1) authorizes disclosure of employee records to supervisors and other agency personnel who are responsible for making or assisting in employment or security decisions.[1] Petitioner cites no contrary authority.

Petitioner instead contends that this case is distinguishable because of the particular DoD regulations at issue. See Pet. 13 n.5, 14 n.7. Thus, the only disputed question in this case is whether, under DoD regulations, Noyes "ha[d] a need for [petitioner's security file] in the performance of [his] duties." 5 U.S.C. 552a(b)(1); see Pet. App. 4a ("What must be determined * * * is whether the official examined the record in connection with the performance of duties assigned to him and whether he had to do so in order to perform those duties properly."). As petitioner himself puts it, the

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[1] See, *e.g.*, *Pippinger* v. *Rubin*, 129 F.3d 519, 529-531 (10th Cir. 1997) (disclosure of personnel files to IRS employees whose responsibilities included advising IRS District Director about disciplinary matters); *Mount* v. *United States Postal Serv.*, 79 F.3d 531, 533-534 (6th Cir. 1996) (disclosure of medical records to employees with responsibility for making employment and disciplinary decisions); *Britt* v. *Naval Investigative Serv.*, 886 F.2d 544, 549 & n.2 (3d Cir. 1989) (disclosure of criminal investigative report to plaintiff's commanding officer, where the information might be needed to reevaluate plaintiff's access to sensitive information or the level of responsibility he was accorded); *Covert* v. *Harrington*, 876 F.2d 751, 753-754 (9th Cir. 1989) (disclosure of personnel security questionnaires for the purpose of detecting fraud); *Daly-Murphy* v. *Winston*, 837 F.2d 348, 354-355 (9th Cir. 1987) (disclosure to peer review committee of letter suspending Veterans Administration physician's clinical privileges); *Hernandez* v. *Alexander*, 671 F.2d 402, 410 (10th Cir. 1982) (review of Army employee's EEO files in connection with consideration of personnel action against the employee).

dispute in this case involves "the regulatory text, the philosophy underlying the regulations as stated by the issuing agency, and the particular individual's job." Pet. 14. The court of appeals' application of DoD regulations to the circumstances of this case does not warrant review by this Court, especially where there is no disagreement among the lower courts about any pertinent issue of law.

2. The court of appeals, in any event, correctly applied the DoD regulations in this case. Noyes's duties indisputably included assessing petitioner's trustworthiness in connection with petitioner's assignment to sensitive duties with the Joint Chiefs of Staff at the Operations Center. See 32 C.F.R. 154.60(a). And DoD regulations expressly authorize access to personnel security reports "for the purposes of determining eligibility * * * for access to classified information [and for] assignment or retention in sensitive duties." 32 C.F.R. 154.65. Although Noyes did not himself have the power to reassign petitioner or to suspend petitioner's access to classified information, see 32 C.F.R. 154.47(b), 154.55(c), there is no dispute that Noyes had become aware of alleged misconduct by petitioner that raised serious trustworthiness concerns. Noyes's decision to review petitioner's security file to verify the accuracy of the allegations against petitioner, before referring the matter for possible personnel actions against petitioner, appropriately furthered Noyes's affirmative responsibility to undertake a continuing assessment of petitioner's trustworthiness.

Petitioner argues that when a DoD supervisor becomes aware of derogatory allegations that implicate the trustworthiness of a subordinate, the supervisor may not investigate the accuracy of the information before reporting it. Pet. 16-17. Nothing in the DoD

regulations establishes that unlikely rule. To the contrary, and as explained above, the personnel security program regulations assign the supervisor a continuing responsibility to evaluate the trustworthiness of subordinates, 32 C.F.R. 154.60(a), *as well as* a responsibility to report relevant, derogatory information (about subordinates or others) that "*is developed* or otherwise becomes available to" the supervisor, 32 C.F.R. 154.55(b)(1) (emphasis added). Noyes honored both responsibilities by reviewing petitioner's personnel security file to assure himself that there were credible allegations against petitioner, and then, having done so, referring the matter to the Air Force for a formal investigation and appropriate personnel action. See Pet. App. 5a.[2]

Petitioner maintains that the court of appeals' decision will grant "tens of thousands" of DoD supervisors access to DoD personnel security files about "millions of Americans." Pet. 10-11. Even if we were to assume for purposes of argument that petitioner's claim has a basis in fact, it is beside the point. Neither the Privacy Act nor DoD regulations place a numerical cap on the number of agency officials who "have a need for [a] record in the performance of their duties." 5 U.S.C. 552a(b)(1). The court of appeals correctly concluded

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[2] Following his review of petitioner's record, Noyes referred the matter to petitioner's service organization (the Air Force) rather than to the commander or security officer of petitioner's duty organization (the Office of the Joint Chiefs of Staff) in the first instance, as required by 32 C.F.R. 154.55(b)(1). See Pet. App. 2a. Any error in following the reporting requirements of the regulations is irrelevant here, however, because the question is whether Noyes's supervisory responsibility under 32 C.F.R. 154.60(a)—not his reporting obligation under Section 154.55(b)(1)—made access permissible under the Privacy Act.

that DoD regulations permit a supervisor to be granted access to a subordinate's personnel security file in a case such as this. It was not the function of the court of appeals to decide whether to impose new, policy-based restrictions on that access.[3]

3. Finally, petitioner contends (Pet. 21-22) that the court of appeals erred in deferring to the government's interpretation of the DoD regulations. The court of appeals' statement that DoD's interpretation is "entitled to weight" (Pet. App. 6a) was an alternative basis for affirming the district court's grant of summary judgment. See *id.* at 5a ("If we were somewhat less sure of our reading of the Defense Department's regulations, the interpretation advanced in the Department's brief would still carry the day."). The existence of that independent and adequate ground further undermines petitioner's case for certiorari to address the court of appeals' own construction of the regulations.

With respect to deference, moreover, the court of appeals correctly characterized the ultimate question framed by this Court's cases: whether the surrounding circumstances indicated that the construction of the regulations stated in the government's appellate brief was "a '*post hoc* rationalizatio[n],'" *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) (quoting *Bowen* v. *Georgetown*

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[3] Petitioner's fact-bound argument (Pet. 18-21) that he would have benefitted from discovery into whether the custodian of the agency's personnel security records made an affirmative determination that Noyes had a need for access to petitioner's records does not warrant this Court's review. Indeed, petitioner cites no case that supports his suggestion (Pet. 18-19) that Section 552a(b)(1) requires every agency employee who wishes to view a record to obtain, before viewing the record, a formal determination that access is sufficiently justified under the statute.

Univ. Hosp., 488 U.S. 204, 212 (1988)), or, rather, reflective of "the agency's fair and considered judgment on the matter in question," *ibid.* See Pet. App. 6a.

Petitioner's argument that the court of appeals incorrectly answered that question turns largely on the signature blocks that appear on various briefs in this case. Pet. 21-23 & n.12; see Pet. App. 13a-14a (Tatel, J., dissenting). Petitioner ignores facts such as Noyes's record statement (*id.* at 90a) that he followed "procedure" in reviewing petitioner's file. In any event, petitioner's argument about DoD's consideration of its own regulations involves only the application of settled law to particular facts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2001